

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

Mailed:
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Queen Elizabeth II Health Sciences Centre

Serial No. 76371942

Raymond A. Flansberry of Flansberry, Menard & Associates
for Queen Elizabeth II Health Sciences Centre.

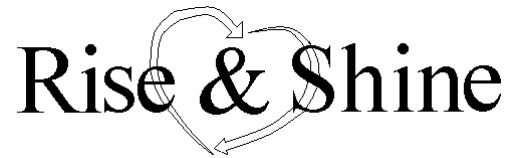
Nicholas K.D. Altree, Trademark Examining Attorney, Law
Office 108 (David Shallant, Managing Attorney).

Before Seeherman, Hanak and Holtzman, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Queen Elizabeth II Health Sciences Centre, a Canadian
corporation, has appealed from the final refusal of the
Trademark Examining Attorney to register RISE & SHINE and
design, as shown below, for services identified, as
amended, as "cooperative advertising and marketing program
in the field of health care."¹

¹ Application Serial No. 76371942, filed February 19, 2002,
based on an asserted bona fide intention to use the mark in
commerce. The application as originally filed identified the
services as "marketing services whereby participants/licensees



Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark RISE 'N SHINE NORTHEAST CARE CENTER INC. and design, as shown below, with the words CARE CENTER INC. disclaimed, and previously registered for "medical services namely, providing in-patient and out-patient medical care for the mentally retarded and developmentally disabled,"² that, if used in connection with the identified services, is likely to cause confusion or mistake or to deceive.



pay a fee to be associated with the Rise & Shine Program." Applicant amended its identification in response to the Examining Attorney's objection that the original identification was indefinite.

² Registration No. 1459652, issued September 29, 1987; Section 8 affidavit accepted; Section 15 affidavit received. The lining shown in the mark on the drawing is a feature of the mark and does not indicate color.

Applicant filed both an appeal brief and a reply to the Examining Attorney's appeal brief. Applicant did not request an oral hearing.

It is noted that applicant's appeal brief does not conform to the requirements of Trademark Rule 2.142(b)(2) in that it is 26 pages long, and the rule specifically states that, without prior leave of the Board, an appeal brief may not exceed 25 pages. Section 1203.01 of the TTAB Manual of Procedure states that "If an applicant files a brief that exceeds the twenty-five page limit without prior leave of the Board, the brief will not be considered, although the failure to file a conforming brief will not be treated as a failure to file a brief which would result in the dismissal of the appeal." In view of this stated policy, normally we would give applicant's main brief no consideration. However, the Board failed to notify applicant, in its acknowledgment of applicant's brief, that the brief was unacceptable, and forwarded it to the Examining Attorney, who in turn considered it and, indeed, quoted from it. In these circumstances, the Board will consider the brief,³ but applicant and its counsel are

³ It is also noted that applicant has included an extra double space between the paragraphs of its brief, and that if applicant had not done so it would have been within the 25-page limit. Although the Board considers the number of pages submitted, without regard to whether the applicant could have condensed the

cautioned, in terms of any future appeals, that the 25-page limit rule will be strictly enforced.

There are some additional points we must consider with respect to applicant's briefs. In its main brief, applicant has given the numbers for what it asserts to be the "hits" produced by a search of the Patent and Trademark Office database for the words "rise" and "shine," and has listed, by mark, class, registration number and owner, what it asserts to be various registered RISE AND SHINE marks. The Examining Attorney has objected. The Examining Attorney's objections are well taken. The submission of a list of registrations is insufficient to make them of record. See *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974). Accordingly, we have not considered the statement regarding the "hits," nor have we considered the listing of marks.

We also note that in the last pages of its brief applicant has cited to several "unpublished" Board cases, providing only a serial number and decision date, and no USPQ cite. The Board gives no consideration to decisions that are not marked "citable as precedent." *General Mills Inc. v. Health Valley Foods*, 24 USPQ2d 1270 (TTAB 1992).

type or margins, in terms of determining whether an applicant has complied with the page limitation, it is obvious that applicant could have submitted an appeal brief of the appropriate length without deleting any material.

Applicant has attached three exhibits to its reply brief. Trademark Rule 2.142(d) provides that the record in an application should be complete as of the filing of the notice of appeal. These exhibits are manifestly untimely, and have not been considered.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to a consideration of the marks, and the basic proposition that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate

conclusion rests on a consideration of the marks in their entireties. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). In this case, we find that RISE & SHINE is the dominant element of applicant's mark, and RISE 'N' SHINE is the dominant element of the cited mark. Although both marks contain differing design elements, it is the words that must be accorded greater weight because it is by these words that purchasers would refer to or request the services. In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987). Although the registered mark also contains the phrase NORTHEAST CARE CENTER INC., this phrase appears in much smaller letters than the words RISE 'N' SHINE and, given that the registrant is Northeast Care Center Inc., people will regard this portion as a trade name or house mark, with RISE 'N' SHINE as the trademark for the particular services. As a result, when they see the "trademark" portion RISE & SHINE without the trade name, they will simply view it as a variant of the registered mark.

In terms of appearance, although there are different design elements and, as noted, the trade name Northeast Care Center Inc. in the registrant's mark, the prominent presence of the words RISE & SHINE/RISE 'N' SHINE in each mark gives both marks a similar appearance. Further, these

words are essentially identical in pronunciation, since the ampersand in applicant's mark is the phonetic and connotative equivalent of the 'N in the cited mark.

Although the trade name in the registered mark does, of course, add additional syllables, it does not take away from the phonetic similarity of the main portions of the marks. Further, it is likely that many consumers will shorten the cited mark and refer to it as simply RISE 'N' SHINE.

In terms of connotation, the dominant portions of the marks are identical. As previously discussed, the additional trade name in the registered mark and the designs do not change the connotation of these words. In short, both marks convey very similar commercial impressions.

Applicant has asserted that the cited registration is entitled to a limited scope of protection because it consists of common words, rather than invented ones. This is a misstatement of the law. Although invented terms are entitled to a broad scope of protection, so too are arbitrary marks, even if they consist of common words, and under this criteria we find the cited RISE 'N SHINE and

design mark to be an arbitrary and inherently distinctive mark for the services at issue.⁴

This brings us to a consideration of the services. We first correct certain inaccuracies in applicant's argument. Applicant has tried to distinguish the services based on the geographic areas in which it asserts they are rendered. Specifically, applicant contends that the registrant's trademark "is associated with a single health center" in Ohio, while applicant's trademark is used in connection with "over ninety (90) Atlantic Canadian health care centers." Brief, p. 6. In its reply brief, applicant states that the identification in the cited registration is inaccurate because, according to information applicant has found from registrant's web site, its services are directed to persons with mental retardation and developmental disabilities throughout Northeast Ohio, and that the services are "primordially [sic] daily services consisting of residential care and/or homecare services to aid in habilitation [sic] such as providing assistance with

⁴ As previously noted, applicant's mere listing of third-party RISE & SHINE marks is not sufficient to make them of record. Moreover, even if they were of record, they would not demonstrate that RISE 'N SHINE is a weak mark for either the services identified in registrant's registration or applicant's registration. The classes of those registrations indicate that they are for goods which appear to be totally unrelated to these services, e.g., Class 3 (cosmetics) and Class 30 (foods).

bathing, showers, grooming, dressing, meal preparation, housekeeping, laundry and providing medication and dietary supervision." Reply brief, p. 14.

Applicant has not properly submitted any evidence with respect to the registrant's services. More importantly, it is well established that the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in the cited registration, rather than what the evidence shows the goods and/or services to be. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, NA*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re William Hodges & Co., Inc.*, 190 USPQ 47 (TTAB 1976). Because the registrant owns a geographically unrestricted registration, and applicant seeks a geographically unrestricted registration, we must assume that the parties' services may be rendered throughout the United States, not just, respectively, in a section of Ohio or in Atlantic Canada. Therefore, the services could be rendered in close proximity to each other. Moreover, because applicant's advertising and marketing program is not restricted as to particular health care fields, we must assume that it would also encompass advertising and marketing with respect to

the field of medical care for the mentally retarded and developmentally disabled.

We recognize that there is a difference between medical services and the service of providing a cooperative advertising and marketing program in the field of health care. At first blush, it would appear that advertising services would be directed to a different class of consumers than health care services, such that there would not be an opportunity for confusion to occur. See *Local Trademarks Inc. v. The Handy Boys Inc.*, 16 USPQ2d 1156 (TTAB 1990). That is, the customers for advertising services in the field of health care would normally be medical personnel and health care facilities, while medical services such as those identified in the cited registration would be directed to mentally retarded and developmentally disabled persons and their families and doctors.

However, in the present case, applicant has explained that it provides:

A marketing program which allows businesses and charitable organizations to form partnerships with each other to market an image, product or service for their mutual benefit, all the while creating an opportunity to service and benefit all health centers in Atlantic Canada. The only way healthcare organizations are involved is to profit from the Applicant's program which is designed to provide focused access to

cause related marketing opportunities. The Applicant's goal is to support health care communities across Canada by offering a channel to build awareness of the needs of health care facilities in Canada. Consumers may support Canadian health care by purchasing products or services marked with the Rise & Shine logo. The Applicant provides resources and funding while at the same time addressing business-marketing objectives. The Applicant targets and services businesses that would like to enter a marketing program which will help them sell more of their products (which products are not necessarily in the health field) because the trademark (the Rise & Shine logo) works as an incentive to buy, indicating to customers that the participating businesses are associated with a program that benefits healthcare.

Response dated December 18, 2002.

Thus, applicant's services are not directed solely to healthcare facilities to help them in advertising their healthcare services. On the contrary, the primary focus of applicant's services appears to be companies which are not in the healthcare field. Essentially, these companies are solicited to be part of applicant's advertising and marketing program. They then mark their products with applicant's logo or use the logo in connection with their services, in order to inform customers that they are participants, and customers are encouraged to purchase the

products or services because such purchases benefit health care facilities.

As a result, the general public is not only exposed to applicant's services, but they are participants in the cooperative advertising and marketing program offered by applicant. These consumers, knowing of the registrant's medical services offered under the RISE 'N SHINE mark, are likely to assume that applicant's advertising and marketing program identified by the RISE & SHINE mark is designed to raise money for the registrant's operation, and that the advertising and marketing program is sponsored by or associated with the registrant.

We also note (contrary to the situation in Local Trademarks Inc., supra, that the Examining Attorney has submitted evidence showing the relatedness between medical services and advertising services. The Examining Attorney has made of record numerous third-party registrations showing that a single mark has been registered for marketing or advertising services and for medical services. See, for example, Reg. No. 2364369 for, inter alia, marketing consultation and medical services, namely, cardiology and cardiovascular care services; Reg. No. 2310529 for business management and advertising services in the field of health care and medical services; Reg. No.

2436390 for, inter alia, cooperative advertising and marketing services for medical offices; providing general clinical medical services and providing specialized clinical and surgical services in the field of pain medicine and pain management; and Reg. No. 2621497 for advertising agency and providing medical information in the field of pain; general health care services. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Accordingly, we find that applicant's use of the applied-for mark for its identified services is likely to cause confusion with the cited registration.

In reaching this conclusion, we wish to make it clear that we have not treated applicant's services as being health care services, as applicant suggests the Examining Attorney has. Although applicant obviously renders such services, they are not the services which are the subject of the current application. We are very much aware that applicant's identified services are "cooperative advertising and marketing program in the field of health care," and that such services are different from the

medical services identified in the cited registration. However, it is not necessary that the goods or services of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods or services are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods or services are such that they would or could be encountered by the same person under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978).

Finally, we are not persuaded by applicant's argument that confusion is not likely because the respective services are purchased with care. As noted, the general public are participants in applicant's advertising and marketing program. Whether or not they are actually users of the registrant's medical services, they may decide to purchase products in the belief that they are helping registrant's operations, and thus their confusion is relevant to our determination. Because of the similarity of the marks, these consumers are likely to assume they

Ser No. 76371942

identify services associated with or sponsored by the same source.

Decision: The refusal of registration is affirmed.